Calendar No. 257

101ST CONGRESS *1st Session* | SENATE | REPORT 101-162

S.J. RES. 180

OCTOBER 6 (legislative day, SEPTEMBER 18), 1989.—Ordered to be printed

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Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, MINORITY AND SUPPLEMENTAL VIEWS

[To accompany S.J. Res. 180]

The Committee on the Judiciary, to which was referred the Senate Joint Resolution (S.J. Res. 180) to amend the Constitution so that "Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States," having considered the same, reports unfavorably thereon and recommends that the joint resolution do not pass.

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I. SUMMARY

In a government of checks and balances, the principal check in the process of amending the Constitution is the United States Congress. Of the 33 amendments proposed by Congress, 26 have been ratified by the States. And once an amendment is submitted to the States, it is unalterable: The States cannot amend, revise, soften, or substitute for a proposed constitutional amendment—they can only vote to ratify or reject it. Two hundred years of history counsel that in order to satisfy its weighty constitutional responsibility under article V, Congress must ensure that at least three conditions have been met before it approves an amendment to the Constitution. First, it must ensure that the proposed amendment is necessary. Second, it must ensure that the meaning of the proposed amendment has been clearly stated by its proponents and is clearly understood. Third, it must ensure that the proposed amendment does not suffer from any serious flaws. The extensive hearings before the Judiciary Committee demonstrated that S.J. Res. 180 fails each of these tests. It should not be adopted.

Our Constitution has endured the test of time because, to a large degree, we have marked only its great outlines and have reserved the process of amendment for, in James Madison's words, only "great and extraordinary occasions." Amendments have been bore out of necessity, not of convenience. In contrast, S.J. Res. 180 asks the Congress to turn to the amendment process as a first—not as a last—resort. This amendment is premature and is not necessary at this time because the physical integrity of the American flag can be protected through legislation. Just as the Supreme Court does not decide a question of Constitutional law in advance of the necessity of amending the constitution in advance of the necessity of deciding it, so, too, should Congress not amend the Constitution in advance of the necessity of amending it. As Judge Louis Pollak put it during his testimony: '[T]o move first to revising the Constitution rather than to undertake a statutory remedy would be grasp the nettle where there is no compelling reason to do so."

Even if there were a need to amend the Constitution at this time, S.J. Res. 180 would not be the appropriate vehicle. Four days of extensive hearings demonstrated that the meaning of S.J. Res. 180 is entirely uncertain, and that its text leaves entirely unanswered the critical question of which, if any, of the Bill of Rights it will override. As currently worded, the proposed amendment is so ambiguous that either it adds nothing to the Constutution and, in

the words of one amendment supporter, "would do nothing to alter the constitutional landscape carved out by the Court" in *Texas* v. *Johnson,* or it overrides the entire Constitution and confers upon Congress and the States an unprecedented degree of power and authority. There simply is no way of knowing with any degree ~~of~~ certainty whether this proposed amendment creates an exception to one, some, none or all of the Bill of Rights.

Finally, even if S.J. Res. 180 were necessary and even if its meaning were clear, it is so seriously and fundamentally flawed that it would undermine the spirit and structure of the Constitution. Based on the testimony of some of its proponents, this amendment, if adopted, would for the first time in our history give Congress and each State legislature the power and discretion to criminalize conduct if that conduct contains an idea or a message of which the legislature does not approve. The power to censor, in other words, would have constitutional sanction. Furthermore, Congress and the States would have nearly unbounded authority to define "physicial desecration," which the Justice Department's witness in turn defined as "to put to an unworthy use." With such an open-ended definition, a wide range of conduct with respect to the flag would likely be subject to prosecution—particularly since S.J. Res. 180 would be "an invitation," as one witness put it, "to legislatures to rule far more widely than any of them had supposed they could" in the past.

For these reasons, the committee reported S.J. Res. 180 to the full Senate with an unfavorable recommendation, and for these reasons we urge that it not be adopted.

II. Legislative History

On June 21, 1989, the Supreme Court rendered its decision in *Texas* v. *Johnson,* 109 S. Ct. 2533 (1989). In a 5–4 decision, the Court held that Gregory Johnson's conviction under section 42.09 of the Texas Penal Code—which made it a crime to intentionally or knowingly "deface, damage, or otherwise physically mistreat" a "state or national flag" in such a way "that the actor knows will seriously offend one or more persons likely to observe or discover his action"—violated the first amendment.

On July 18, Senators Dole, Dixon, Thurmond, and Heflin, as principal cosponsors, introduced S.J. Res. 180, which states:

> The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States.

In accordance with a July 14, 1989, unanimous consent agreement, the Senate Judiciary Committee held 4 days of hearings on S.J. Res. 180 and S. 1338 ("The Flag Protection Act of 1989") and related issues. These hearings were held on August 1, August 14, September 13, and September 14, 1989.

The committee was fortunate to receive testimony from a broad range of constitutional scholars, constitutional historians, representatives of veterans' groups and individual veterans, as well as from Members of the Senate and from the Department of Justice. The Committee heard testimony from Senator Strom Thurmond;

former Senator Charles McC. Mathias, Jr.; William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice; Professor Laurence H. Tribe; Charles J. Cooper; the Honorable Robert H. Bork; Dean Geoffrey R. Stone; the Honorable Erwin N. Griswold; the Honorable Louis H. Pollak; Prof. Stanley I. Kutler; Prof. Michael Parrish; Senator Robert Dole; Senator Alan Dixon; H.R. "Sparky" Gierke, on behalf of the American Legion; John F. Heilman, on behalf of the Disabled American Veterans; Walter G. Hogan, on behalf of the Veterans of Foreign Wars; R. Jack Powell, on behalf of the Paralyzed Veterans of America; Mary Stout, on behalf of the Vietnam Veterans of America; Gary Freeman; Col. Harry G. Summers; James H. Warner; Prof. Walter Dellinger, Prof. Gordon Baldwin; Prof. Brady Williamson; Prof. Eugene Hickok; and Prof. Stephen Presser. Prof. Forrest McDonald was also scheduled to testify, but was unable to attend.

Overall, the committee heard testimony from 16 witnesses during approximately 20 hours.

III. Discussion

A. THE CONSTITUTION SHOULD BE AMENDED ONLY AS A LAST RESORT

1. The Constitution should be amended out of Necessity, not convenience

Amending the Constitution of the United States is an extraordinarily rare and solemn act. The amendment process has been successfully invoked on only 26 occasions throughout our 200-year history, and on only 16 occasions since the adoption of the first 10 amendments, the Bill of Rights. Describing the Founders' understanding of the amendment process, U.S. District Court Judge and constitutional historian Louis Pollak said it was:

> perceived quite clearly as the instrument for adapting the Constitution of the United States to the changes unforeseen and unforeseeable that future history would call into being. To that end, as Madison put it in the 43rd Federalist, the complex amendment process * * * was one which was designed to guard "equally against that extreme facility which would render the Constitution too mutable and that extreme difficulty which might perpetuate its discovered faults." (Testimony of Judge Louis Pollak, Aug. 14, 1989, at 18.)

Identifying the "changes unforeseen and unforeseeable" that warrant invocation of the amendment process has always been—and undoubtedly will continue to be—a subject of debate. Indeed, the fact that we are a nation that not only allows but encourages that debate—a phenomenon owing in large part to the first amendment and its interpretation and application by the Supreme Court—is what has made us the envy of the world. But while we can and should debate the scope of the appropriate subjects for amendment, surely we can all agree on one overarching principle: The Constitution should be amended only when it is necessary to do so. The amendment proces should be invoked as a last—not as a first—resort.

Our Constitution has endured the test of time because, to a large degree, we have adhered to Chief Justice John Marshall's maxim that a constitution should not have the prolixity of a legal code but rather requires "only" that "its great outlines should be marked, its important objects designated." We have been guided as well by the words of James Madison in Federalist No. 49, where, noting that amendment should be reserved for "great and extraordinary occasions," he said.

> [A]s every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not posses the requisite stability. (Rossiter, ed., The Federalist Papers, No. 49, at 314 (1961).)

Those that urge the adoption of S.J. Res. 180 at this juncture—before any showing that an amendment is necessary—would turn the teachings of James Madison and John Marshall on their head, so that the amendment process would be invoked as the first, and not the last, course of action. In doing so, they would ignore the fact that the Constitution has been amended only in truly exceptional circumstances—circumstances borne out of necessity, not of convenience. They would ignore the fact that of the more than 10,000 proposals to amend the Constitution, only 26 have been adopted. And they would ignore the fact that while four amendments—the 11th, the 14th, the 16th and the 26th—have been adopted in response to decisions of the Supreme Court, "hundreds of others," in the words of one amendment proponent (McDonald, "Cleaning Up the Justices' Mess," The Wall Street Journal, July 31, 1989), have been proposed for that reason and have failed to win ratification.

History counsels caution and restraint in amending the Constitution. For 200 years, we have acted out of necessity and have refrained from burdening the Constitution with a codelike comprehensiveness. For 200 years, we have retained the ennobling spirit that guided its formation. Let ours not be the generation to dampen that spirit.

2. There is no need to proceed with S.J. Res. 180 at this time because a statutory alternative is clearly available

The principle that the amendment process should be invoked as the last—not as the first—resort is perhaps most compelling where, as here, legislation is available to address the matter at hand. Indeed, Congress is well-advised in the present circumstances to adhere to a principle that has long guided the Supreme Court: The principle of not addressing constitutional questions if there is some alternative way to resolve a dispute.

The most prominent expression of the fundamental principle can be found in the concurring opinion of Justice Louis Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936). In Justice Brandeis's oft-cited words:

> The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it. "* * *" It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of a case." * * * *The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.* (*Id.* at 347 (Brandeis, J., concurring); emphasis added; citations omitted.)

Justice Felix Frankfurter, one of the great conservative Justices of this century, expressed the same view in *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944): "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."

The same essential principle should apply here. Just like the Supreme Court will "' not anticipate a question of constitutional law in advance of the necessity of deciding it,' " (Ashwander, 297 U.S. 346 (Brandeis, J., concurring)), so, too, should Congress not amend the Constitution "in advance of the necessity" of amending it. And there is no need to amend the Constitution at this time. Because the physical integrity of the American flag can be protected through legislation, the legislative route should and must be tried first.[1]

As Senator Specter stated: "[T]here is wisdom amng the decisions of the Supreme Court and otherwise for choosing a statutory remedy in preference to a constitutional remedy where that will do the job." (Transcript of Proceedings, Aug. 14, 1989, at 5-6.) That same theme was echoed by Chairman Biden: "[T]he general rule of the Constitution is you should not do by way of the Constitution what you might be able to do by way of statute. * * *" (Transcript of Proceeding, Sept. 14, 1989, at 99.) and as Senator Leahy put it: "[A]mending our Constitution * * * is a grave undertaking—one we should consider only to redress the most profound grievances. In this instance, it is not necessary. We have the power and authority to prohibit desecration of the flag by statute." (Cong. Rec., daily ed., July 18, 1989, at S 8094.)

Several witnesses emphasized the fundamental importance of pursuing the statutory route first. Judge Pollak, for example, testified:

> This is not a case in which one should turn first to constitutional surgery * * * I think it clear that this is a situation in which to move first to revising the Constitution rather than to undertake a statutory remedy would be to

[1] The basis for S. 1338, the Flag Protection Act of 1989, and its availability as a legitimate, proper and constitutional response to *Texas* v. *Johnson* is set forth in report No. 101-152. Rather than reiterating those arguments here, the committee incorporates by reference the entire report on S. 1338.

> grasp the nettle where there is no compelling reason to do so. (Pollak testimony, at 22-23.)

And in the words of Geoffrey Stone, Dean of the University of Chicago Law School:

> If these is a reasonable possibility that Congress can address a problem through legislation, then the legislative alternative should ordinarily be pursued first. Amendment of the United States Constitution should be understood as a most solemn act, and it would be unwise in the extreme to pursue it as a first rather than a last resord. (Testimony of Geoffrey Stone, Aug. 1, 1989, at 198.)

Equally firm in his conviction that the statutory route should be tried first is Prof. Henry Monaghan of Columbia Law School, one of the Nation's leading scholars in constitutional history and *stare decisis*. In a written statement submitted to the committee, Professor Monaghan stated:

> *In the present circumstances, it seems to me entirely contrary to our constitutional tradition to resort to the amendment process.* It is surely no answer to say that a constitutional amendment would put the flag desecration matter beyond doubt. Even accepting that assumption, the argument mistakes a definition for a justification. Congress does not ordinarily resort to the constitutional amendment process because there is some doubt about the validity of its legislation. Nor should it do so here. (Written statement of Henry Monaghan, at 5-6; emphasis added.)

Similarly, Walter Dellinger, professor of Law at Duke Law School, stated: "It is difficult to imagine a more irresponsible act * * * than to send out to fifty state capitols an amendment to the Constitution for a purpose that could likely be achieved by a statute." (Written statement of Walter Dellinger, Sept. 14, 1989, at 16.)

As summarized by Senator Kohl:

> All of us agree that flag burning is reprehensible. We know that flag burners are irresponsible, infantile and irrelevant to the real political discourse of our nation. The question is, how should we respond to this offense? As a citizen, I will continue to denounce those who defile the symbol of our collective aspirations. But as a lawmaker, I am reluctant to tamper with the document that has served us so well for 200 years. As long as we have a legislative solution at hand, I cannot endorse an exception to the Bill of Rights. (Transcript of proceedings, Aug. 1, 1989)

3. S.J. Res. 180 carries a particularly heavy burden of necessity because it would qualify the liberties embodied in the first amendment

There is great risk that S.J. Res. 180 would qualify in some measure the freedoms embodied in the first amendment. Because S.J. Res. 180 would, as acknowledged by one supporter of the amendment, "change the constitutional law of the Republic," (Testimony

of Stephen Presser, Sept. 14, 1989, at 90), it carries a particularly heavy burden of necessity—a burden that has not been satisfied.

As Senator Simpson said at the outset of the Judiciary Committee's hearings: "We have to use caution, obviously, that is true, when amending the Constitution, especially when the amendment affects the Bill of Rights." (Opening statement of Senator Simpson, Aug. 1, 1989, at 24.) And in the eloquent words of Senator Sanford: "The Bill of Rights has special meaning. * * * [T]his great statement of faith in liberty has stood the test of time. For more than 200 years, it has been the greatest statement of freedom the world has ever known." (Cong. Res., daily ed., S 9056, July 31, 1989.)

In one of the most compelling statements about the importance and uniqueness of the Bill of Rights in general and the first amendment in particular, Justice Cardozo said in *Palko* v. *Connecticut,* 302 U.S. 319 (1937):

> We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the * * * Bill of Rights and brought within the Fourteenth Amendment by a process of absorbtion. * * * If the Fourteenth Amendment has absorbed them, the process of absorbtion has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. * * * This is true, for illustration, of freedom of thought, and speech. *Of that freedom, one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.* With rare aberrations, a pervasive recognition of that truth can be traced in our history, political and legal." (*Id.* at 326–27; emphasis added.)

Judge pollak described well the implications of dampening that "indispensable condition:" "To modify the First Amendment would be to enter upon a course * * * that this Republic has never pursued before." (Pollak testimony, at 27.)

Former Senator Charles McC. Mathias, Jr., framed the question that must be answered in analyzing S.J. Res. 180 when he asked: "Shall we burnish [the first amendment] and maintain it for our children as it was given to us, or shall we in some way diminish its size and force?" (Testimony of Senator Charles McC. Mathias, Jr., Aug. 1, 1989, at 49.) Several members answered this fundamental question in poignant and compelling terms.

Senator Kennedy, for example, succinctly stated that "[t]he concept of free and open debate, at the heart of our democracy, will be an emply promise if the Government can censor those who criticize it." (Transcript of Proceedings, August 1, 1989, at 18.) And Senator Humphrey put it well when he said: "Except to ensure public safety and to protect the rights of others, speech must never be restricted, simply because the majority want it restricted. The right of free speech must always be as broad and far reaching as the rights of others will permit." (*Id.* at 40.) Senator Simon made this same point, albeit in different terms, when he added: "I have great respect for the flag, but I also have great respect for the Constitution. Let us not out of reverance for one do damage to the other." (*Id.* at 35.) Finally, Senator Leahy spoke for many when he said:

> Our First Amendment protects the freedom of every American to think, to speak and to write and to defend and actually to offend beliefs as we please without the threat of a government stepping in with censorship or reprisal. We are different than any nation on earth * * *. No major power in the world has ever had the complete freedom of speech that the United States has, but no other democracy has grown and flourished the way the United States of America has because of that. Because in the ability to dissent, we have diversity, and in diversity, we have democracy. (Statement of Senator Leahy, Aug. 1, 1989, at 62.)

As summarized by Senator Sanford: "The flag is flying high and proud because it represents the Bill of Rights. We cannot protect the flag by disminishing the Bill of Rights. That would diminish the flag." (Cong. Rec., daily ed., S 9056, July 31, 1989.)

B. THE CONSTITUTION SHOULD NOT BE AMENDED WHEN THE MEANING OF THE PROPOSED AMENDMENT IS ENTIRELY UNCERTAIN

Throughout the 4 days of extensive hearings before the Judiciary Committee, one theme emerged from the testimony of supporters and opponents of a constitutional amendment: The meaning of S.J. Res. 180 is entirely uncertain, and its text leaves entirely unanswered the critical question of which, if any, of the Bill of Rights it will override. As currently worded, the proposed amendment is so ambiguous that either it adds nothing to the Constitution and, in the words of one supporter of a constitutional amendment, "would do nothing to alter the constitutional landscape carved out by the Court" in *Texas v. Johnson,* or it trumps the entire Constitution and confers an unprecedented degree of legislative power and authority. As summarized by Professor Dellinger, S.J. Res. 180 "would create an entirely undefined exception to either one, some, none or all of the Bill of Rights." (Dellinger written statement, at 7.)

1. S.J. RES. 180 might do nothing to reverse Texas *v.* Johnson

According to a witness who testified in support of a constitutional amendment, as well as witnesses who testified against it, S.J. Res. 180 will not reverse *Texas* v. *Johnson* and thus will not accomplish what its proponents say it will accomplish. The text of S.J. Res. 180 simply makes explicit the power of Congress and the states to legislate with repect to the flag—a power that has always been assumed to exist—and does not in any way exempt the exercise of that power from the first amendment. Thus, any legislation enacted pursuant to the proposed amendment would still have to satisfy the first amendment and the principles of law articulated by the Court in *Texas* v. *Johnson.*

If adopted, S.J. Res. 180 would add the following language as the 27th amendment to the Constitution:

> The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States.

Testifying on behalf of the Administration, William P. Barr, Assistant Attorney General in charge of the Office of Legal Counsel at the Department of Justice, stated that this amendment would reverse *Texas* v. *Johnson,* return the law to where it stood the day before *Johnson* was decided and restore to Congress and the States precisely the power they had before the decision to prohibit certain conduct toward the flag. Assistant Attorney General Barr testifed that "the legislature would have the power under this amendment * * * that they had prior to June 21st—so this is nothing new * * *" (Testimony of William P. Barr, Aug. 1, 1989, at 93), and that "this amendment is intended to undo the damage caused by the Court's decision, and to restore to Congress and the States the power they had been exercising for nearly a century." (Answer of William Barr to written question 6 from Senator Grassley.)

Charles Cooper, currently with the law firm McGuire, Woods, Battle & Boothe and formerly Assistant Attorney General for the Office of Legal Cousnel, also construes S.J. Res. 180 in this fashion. He testified that it

> "would be designed to and would be well tailored to restore the status quo ante *Johnson,* in other words, to essentially overrule the *Johnson* case and restore to the states and to the Congress constitutional power to enact flag desecration statutes that are limited in their purpose to protecting the flag from contemptuous conduct by itself." (Testimony of Charles Cooper, Aug. 1, 1989, at 211.)

This testimony by Assistant Attorney General Barr and Mr. Cooper strongly suggests that the intent of S.J. Res. 180 is to amend the first amendment so that it does not apply to State and Federal legislation enacted "to prohibit the physical desecration of the flag of the United States," since, in Chairman Biden's words, it would "grant[] explicitly the right to the states to do things that prior to the passage of the 27th Amendment would in fact have been viewed as in violation of the First Amendment." (Transcript of proceedings, Sept. 14, 1989, at 27.) Under the theory advanced by Assistant Attorney General Barr and Mr. Cooper, S.J. Res. 180 would, in efect, validate the statute struck down in *Texas* v. *Johnson* and others like it.

The problem with this theory is that on its face, S.J. Res. 180 does not purport to override the first amendment. It simply adds an additional basis of legislative authority to the powers conferred on Congress by the Constitution—powers constrained by the Bill of Rights. Indeed, the language of S.J. Res. 180 is remarkably similar to the existing language in the power-conferring clauses in the Constitution such as section 8 of article I ("The Congress shall have Power to lay and collect Taxes;" "The Congress shall have Power * * * To regulate Commerce"); in section 5 of the 14th amendment ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article"); and section 2 of the 15th Amendment ("The Congress shall have power to enforce this article by appropriate legislation"). The Bill of Rights applies to the exercise of all of these powers.

Recognizing these basic interpretive principles, witnesses who both support and oppose S. J. Res. 180 testified to the effect that

none of the objectives identified by Assistant Attorney General Barr and Mr. Cooper would be achieved under the proposed amendment.

For example, Eugene Hickok, assistant professor of political science at Dickinson College, a former special assistant at the office of legal counsel and a strong supporter of a constitutional amendment, stated that as presently worded, S. J. Res. 180 would not reverse *Texas* v. *Johnson* and would not give Congress and the States any more power than they presently hold. In his words:

> An amendment similar to the one offered by President Bush is an appropriate first step in that direction [overturning *Johnson*]. However, *as it currently stands, the proposed amendment would not provide Congress with any more authority to protect the flag than it has at this moment * * *. Amending the Constitution with the language suggested by the President would do nothing to alter the constitutional landscape carved out by the Court in Johnson.* When writing legislation under the authority of this proposed amendment, the Congress would still have to consider the First Amendment and the Court's understanding of how that Amendment might limit the Congress' ability to protect the flag." (Written statement of Eugene Hickok, Sept. 14, 1989, at 9; emphasis added.)

Professor Hickok added that "I am persuaded * * * that you have to be a little more explicit about how this relates to the First Amendment" (Testimony of Eugene Hickok, Sept. 14, 1989, at 92), and that "I do feel the Administration's proposed amendment needs to be rewritten so that it speaks directly to the Court's decision in *Johnson*." (Answer of Eugene Hickok to written question 3 from Senator Thurmond.)

In a written statement submitted to the committee, William Van Alstyne, professor of law at Duke Law School, made this same point:

> [S. J. Res. 180] affects no current, and it proposes no future, interpretation of the First Amendment. Indeed, if that is so, * * * the amendment is misleading and poor. It does not reverse *Texas* v. *Johnson*. Likewise, it does not direct any different outcome in any like case in the future. It does no more than disfigure the Constitution of the United States with additional language empowering Congress and the states to prohibit acts of physical desecration, still subject to the limitations in the Bill of Rights." (Written statement of William Van Alstyne, at 3.)

Others construe S. J. Res. 180 in precisely the same fashion. Gordon Baldwin, professor of law at the University of Wisconsin Law School, for example, said that "[t]he proposed amendment does not prevent anything. It simply says Congress has the power to protect the flag from physical desecration * * *. That power already exists." (Testimony of Gordon Baldwin, Sept. 14, 1989, at 9.) Professor Dellinger added:

> The amendment would not alter in any way the Supreme Court's decision in *Texas* v. *Johnson*. Any act

> passed under the amendment would still have to satisfy the First Amendment, and any statute which, like the Texas statute, made the criminality of burning turn on the nature of the message being communicated, would still be invalid under *Johnson.*" (Testimony of Walter Dellinger, Sept. 14, 1989, at 8.)

Professor Hickok candidly admitted that for S. J. Res. 180 to accomplish the objectives identified by its proponents, it would have to be modified. As he put it, "[i]f you feel that the *Johnson* case is bad constitutional law, * * * *it seems to me you should be straightforward in your response to it, as opposed to try to find ways to get around having to say what you really think.*" (Hickok testimony, at 89; emphasis added.) Accordingly, he proposed that S. J. Res. 180 be reworded to specifically exempt application of the first amendment. (*Id.* at 86.) To Professor Hickok's credit, he stated forthrightly that this is a "straightforward, certainly controversial way to state what the intent of the Congress and the President is regarding this issue." (*Id.*) And he agreed that by refusing to acknowledge *expressly* that the intent of S. J. Res. 180 was to amend the first amendment, the proponents of the proposed amendment had failed to engage in a seasoned analysis of the constitutional implications of the *Johnson* decision. (*Id.* at 88.) [2]

The reason that added language to S. J. Res. 180 specifically exempting application of the first amendment is, in Professor Hickok's words, "certainly controversial," was well explained by Professor Van Alstyne, who said in this written statement:

> If they [the drafters of the proposed amendment] mean to oust the First Amendment from further consideration in this matter * * * it is incumbent upon them to say so and to declare the extent of their will in the express terms of the amendment they propose in order to carry into our Constitution that very design. *But that kind of amendment is quite different than the amendment that has been introduced, and accepts a much different burden than the burden reflected in the current proposal. It discharges the necessary obligation to declare that this nation does not want the First Amendment to be available to anyone "physically desecrating" some fascimile of "the flag" of the United States.* (Van Alstyne written statement, at 3; emphasis added.) [3]

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[2] Even if the Supreme Court determined that the text of S. J. Res. 180, as presently worded, did override the first amendment, it would then have to decide how much of the first amendment was exempted. Assistant Attorney General Barr believes that at least the first amendment's vagueness doctrine would remain applicable, as he said in response to a written question from Senator Grassley: "It should be remembered that if and when Congress and the states enact new desecration statutes, they will have to define with specificity the types of conduct they are prohibiting to ensure that the statutes are not unconstitutionally vague." (Answer of William P. Barr to written question 4 from Senator Grassley.) The Court would have to determine whether the language of S. J. Res. 180 warranted this reading, and which, if any, other first amendment principles still applied.

[3] It is noteworthy that the only other time in our history when a constitutional amendment on destruction of the flag was introduced in the Senate, its author, Senator Stevens, made his intent quite clear. In 1970, Senator Stevens proposed S. J. Res. 233, which stated: *"Notwithstanding any other provision of this Constitution,* the Congress shall have power by appropriate legislation to regulate the display and handling of the flag of the United States and to protect it

Continued

Thus, even if the amendment proposed in S.J. Res. 180 passed the Congress and was ratified by the necessary 38 States, the failure to expressly acknowledge its intent means—according to witnesses who support and oppose the amendment—that it might very well add nothing to the Constitution and in no way affect the Supreme Court's decision in *Texas* v. *Johnson*.

2. S.J. Res. 180 might override the entire Constitution

Thus, unless S.J. Res. 180 is understood to override the first amendment, it adds nothing to the Constitution. If it is understood to override the first amendment, however, it might also be understood to override other provisions of the Bill of Rights. After all, nothing in the text of this particular proposed amendment draws any distinction between the application of the first amendment and the application of other provisions in the Constitution.

The implications of such an open-ended and ambiguous amendment are entirely unknown. Profession Dellinger put it well when he said:

> [I]f it does override provisions of the Bill of Rights, *which* provisions does it override? * * * Could a state, for example, in some time of great strife in the twenty-first century, punish flag desecration without having to meet the standards of the Cruel and Unusual Punishments Clause? Could a state, in a future not yet clear to us, dispense with jury trials for flag-desecrators? Could a particularly zealous local government ignore the Fourth Amendment and conduct general house-to-house warrantless searches looking for evidence of desecration? (Dellinger written statement, at 9–10.)

The scope of the power that this proposed amendment confers upon Congress and the states simply cannot be ascertained—all that can be said with confidence is that it is power of uncertain scope. To submit such an amendment to the states would be an abdication of congressional responsibility.

3. An amendment of such uncertain scope would generate and stimulate litigation

Some might argue that the proposed amendment would be construed as occupying a middle position between having no impact on the Constitution and trumping the Constitution in its entirety. The text of the proposed amendment, of course, supports no such reading. Even if read in that fashion, however, that middle ground is yet another unknown commodity—and could be identified only by a series of lawsuits and years of litigation. Thus, even putting the best interpretive light on S.J. Res. 180, it remains seriously flawed because it would stimulate a generation of litigation.[4]

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from desecration." (Cong. Rec. Aug. 28, 1970, at S 30302; emphasis added.) Regardless of the merits of this proposal, the proposed Stevens amendment at least made it clear that the purpose of the amendment was to exempt application of the first amendment (and other provisions of the Constitution, for that matter) to legislation banning destruction of the flag.

[4] Ironically, some have argued that the statutory route is problematic because it will foster litigation and produce delay, and that S.J. Res. 180 would set a tone of certainty and—once and for all—eliminate litigation on this issue. It is clear, however, that—far from putting this issue behind us—S.J. Res. 180 would spawn years of litigation.

Several witnesses testified that, if adopted, the proposed amendment would lead to extensive litigation. For example, Dean Erwin N. Griswold, currently with the law firm Jones, Day, Reavis & Pogue and former solicitor general during the Nixon administration, stated that the proposed amendment "will not only encourage, it will stimulate litigation." (Testimony of Erwin N. Griswold, Aug. 1, 1989, at 241.) Judge Pollak agreed, noting that "I think we can say with confidence * * * that with [S.J. Res. 180], we could anticipate a decade or so of active litigation in which cases would arise in many quarters of the country." (Pollak testimony, at 32.) Gordon Baldwin, professor of law at the University of Wisconsin Law School, testified that the proposed amendment would "invit[e] * * * continued litigation," (Testimony of Gordon Baldwin, Sept. 14, 1989, at 28), and Professor Dellinger added that "far from * * * being a simple and quick solution to a problem, even after ratification, it [S.J. Res. 180] will create a entirely new jurisprudence of the 27th Amendment." (Dellinger testimony, at 25.)

Laurence H. Tribe, Tyler professor of law at Harvard Law School, summarized this issue well when he said: "Ratifying the proposed amendment would do nothing but invite the very kind of litigation and uncertainty that the proponents of the amendment say that the amendment would avoid." (Written statement of Laurence H. Tribe, Aug. 1, 1989, at 9.)

In response to questioning from Senator Kohl, Brady Williamson, lecturer in constitutional law at the University of Wisconsin Law School and a noted first amendment practitioner, identified a damaging consequence of this expected litigation. As he put it:

> [I]f you have a multiplicity of laws, you are going to have a multiplicity of reprehensible incidents to test the law. *So, instead of fostering respect for the flag, we would have the not intended purpose, but I think the inevitable purpose, of fostering disrespect for the flag.* (Testimony of Brady Williamson, Sept. 14, 1989, at 60; emphasis added.)

C. S.J. RES. 180 IS SERIOUSLY AND FUNDAMENTALLY FLAWED

As discussed in section A, supra, there is no need to proceed with S.J. Res. 180 at this time because a statutory alternative is clearly available. Furthermore, the meaning of S.J. Res. 180 is entirely uncertain. Even if a showing of need could be demonstrated and even if the meaning of S.J. Res. 180 were clear, however, there are serious and fundamental problems with the proposed amendment that warrant opposition to its adoption. As Chairman Biden said:

> I have come to the conclusion that it is possible to draft a constitutional amendment that does not do the violence that this [S.J. Res. 180] does. But this particular amendment I find increasingly disturbing * * * (Transcript of Proceedings, Aug. 14, 1989, at 33–34.)

The testimony throughout the 4 days of hearings demonstrated that, in the end, S.J. Res. 180 is "little more than a blank check authorizing unspecified withdrawals and withdrawals of an unspecified amount from America's most precious heritage, the Bill of Rights." (Testimony of Laurence H. Tribe, Aug. 1, 1989, at 161.)

1. S.J. Res. 180 would give legislatures broad power and discretion to censor conduct judged to be offensive

The proposed constitutional amendment would give Congress and each State legislature the power and discretion to criminalize conduct if that conduct contains an idea or a message that the legislature, in the words of Assistant Attorney General Barr, finds "really offensive." (Barr testimony, at 135.) It would mean, as concisely summarized by Senator Kennedy, that "[f]or the first time in 200 years, an amendment would be enacted that creates an exception to the guarantee of freedom of speech protected by the Constitution." (Statement of Senator Kennedy, Aug. 1, 1989, at 20.)

There is little doubt that S.J. Res. 180 would cede broad latitude and discretion to legislative bodies. Indeed, the proponents of the proposed amendment concede as much and argue that this latitude and discretion to define "offensive" conduct are among the proposed amendment's most appealing features.

For example, Assistant Attorney General Barr testified that Congress and the states would have "wide latitude to prohibit that conduct toward the flag that they believe deserved proscription" (Written statement of William P. Barr, at 13); that they would be "permitted and obliged to draw lines" (*id.*); and that they would have "substantial discretion" (*id.* at 20) in fashioning flag laws. To Assistant Attorney General Barr, "offering legislatures the option of prohibiting only intentionally contemptuous physical desecration" is a "significant advantage of the amendment over the statute [S. 1338]." (*Id.* at 19.) By way of summary, he said that "it would be better to provide a constitutional amendment *that would permit the legislatures to focus on the kind of conduct that is really offensive.*" (Barr testimony, at 135; emphasis added.)

What emerged from the testimony of Assistant Attorney General Barr and other proponents of S.J. Res. 180 is that neither a "neutral" statute nor a "neutral" amendment is desirable or sufficient. In their view, a statute or an amendment that prohibits destruction of the flag in all circumstances and does not give legislatures the power and discretion to define what they consider to be "contemptuour" and, in Assistant Attorney General Barr's words, what they determine to be "really offensive" simply does not go far enough.

The testimony of Charles Cooper made this clear, as he said that "[e]ven if [S. 1338] could be squared with [*Texas* v. *Johnson*], it is not a fitting and suitable solution to the problem presented by the *Johnson* case." (Testimony of Charles Cooper, Aug. 1, 1989, at 2.) Elaborating on the reasons that a "neutral" approach is not "fitting and suitable," Mr. Cooper stated:

> The stated purpose of [S. 1338] raises a threshold question that must be considered * * * *Namely, does anyone really want a "neutral" flag desecration statute?* Is it true that "all we want to do" is to protect the physical integrity of all American flags, regardless of the circumstances surrounding the prohibited conduct? * * * My view [is] that no one really wants a "neutral" * * * statute. (*Id.* at 3–4, 6; emphasis added.)

The following exchange between Chairman Biden and Judge Pollack illustrates the implications of ceding to legislatures broad power and discretion to act in a "non-neutral" fashion—that is, to outlaw certain acts of flag destruction and not others:

> Chairman BIDEN. "[T]he argument by those who support * * * [S.J. Res. 180] is that it is the only way legislatures will be able to pick and choose among the views it agrees and disagrees with, allowing them to punish the latter and not the former. * * * In terms of the constitutional history of this country, what are the implications of adding an amendment to the Constitution that gives legislatures this kind of power and discretion to choose what it finds "contemptuous" and what it finds to be not "contemptuous" as it relates to speech?
>
> Judge POLLAK. [T]he problems posed by a constitutional approach of that kind are very grave indeed. * * * [S.J. Res. 180] operates and is meant to operate as a qualification of the First Amendment as the First Amendment has been authoritatively construed by the United States Supreme Court. (Transcript of proceedings, Aug. 14, 1989, at 30–31.)

Equally forceful was Professor Tribe, who testified that as a matter of principle, the first amendment "withdraws * * * the power to censor. And that is exactly what * * * the currently pending amendment wants to add." (Tribe testimony, at 163). Professor Tribe added that the proponents of S.J. Res. 180 "are advocating what not * * * any of the conservative Justices of the Court have ever said we ought to be able to do, censoring the viewpoint being expressed through a particular act." (*Id.* at 167.) As summarized the Chairman Biden, S.J. Res. 180 means "by definition we will be amending the First Amendment, because we will be saying for the first time in our history you can outlaw an action if the action contains an idea you don't like." (Transcript of proceedings, Sept. 13, 1989, at 93.)

There was considerable testimony before the committee, then, that the impact of S.J. Res. 180 would be unprecedented. The following exchange between Chairman Biden and Dean Stone succintly identifies the gravity of what has been proposed.

> Chairman BIDEN. Can you think of any time in our history when we have attempted by * * * constitutional amendment, in the Congress or [ones that have] gotten to the states * * * to * * * change the meaning of the First Amendment * * * relat[ing] specifically to * * * speech * * *?
>
> Dean STONE. None that I am aware of. (Stone testimony, at 203.)

Thus, as Senator Metzenbaum said:

> Like the Olympic runner, each generation takes the torch of liberty from the last one. Each must carry it during its years of responsibility for that Nation's destiny* * * . I hope that ours is not the generation that drops the torch. (Transcript of proceedings, Aug. 1, 1989, at 30.)

We should not celebrate the 200th anniversary of the adoption of the Bill of Rights with an amendment to the Constitution that would, for the first time in our history, qualify the freedoms embodied in the first amendment.

2. S.J. Res. 180 would give legislatures nearly unbounded authority to define "physical desecration"

S.J. Res. 180 would leave it to each individual legislature to define the conduct that is encompassed by the term "physical desecration." In light of the language of S.J. Res. 180 and the testimony of Assistant Attorney General Barr, it is clear that legislatures would have nearly unbounded authority to decide what constitutes "physical desecration." In addition, the scope of what constitutes "physical desecration" would likely vary widely from state to state.

The problems with using the term "physical desecration" are perhaps no better illustrated than by the preamble of S.J. Res. 180, which states:

> Whereas physical description may include, *but is not limited to,* such acts as burning, mutilating, defacing, defiling or trampling on the Flag, or *displaying the Flag in a contemptuous manner* * * * (Emphasis added.)

In elaborating on the definition of "physical desecration," Assistant Attorney General Barr approvingly quoted Black's Law Journal and its definition of "desecrate, which includes "to put to an unworthy use." (Barr written statement, at 17.) He added that this definition "captures the essence of the term as used in the amendment." (*Id.*)

As Senator Kennedy pointed out, if the proposed amendment is intended to allow a legislature to prohibit whatever conduct with respect to the flag that it considers to be putting the flag to "an unworthy use," the range of potential legislation is extraordinarly broad. (*See* transcript of proceedings, Aug. 1, 1989, at 91–95.) Indeed, if putting to "an unworthy use" is the test, there simply is no telling where a legislature might stop—particularly when it could also cite the fact that the preamble includes the far from constraining language of "may include, but is not limited to."

Testimony intended to limit the reach of the proposed amendment further demonstrated the problems with the term "physcial desecration." For example, Assistant Attorney General Barr said that "[s]ome contact with the Flag, some physical touching of the Flag, whether by the person himself or caused by the person would be essential." (Barr written statement, at 16.) At the same time, however, he said that "legislatures could constitutionally prohibit the display of the Flag in a *manner* that they deemed inappropriate * * * Thus, they could prohibit, for example, the display of the Flag on the floor or the upside-down display of the Flag" (*Id.* at 18; emphasis in original)—situations that might not involve some "physical touching."

Thus, the proposed amendment would grant every legislature nearly unlimited authority to decide what, in the particular legislature's view, constituted "physical desecration." An exchange between Chairman Biden and Judge Pollak illustrates the range of

potential State laws under an amendment that uses the term, "physical desecration:"

> Chairman BIDEN. The state of Pennsylvania could determine by statute that having a caricature of the American flag on any commercial product constituted desecration in [that state]. And the state of Delaware could conclude that desecration only constituted the physical burning of a piece of cloth that depicted the flag, that "was" the flag. And the state of Maryland could conclude that use of the flag in any parade or function that was not one that was conducted by one of the major political parties constituted desecration of the flag. Am I misreading what could be done under this constitutional amendment?
>
> Judge POLLAK. I dont' think you are, * * * (Transcript of Proceedings, Aug. 14, 1989, at 32.)

The potential problems associated with the use of the term "physical desecration" were described by Professor Michael Parrish, professor of history at the University of California at San Diego, who said that S.J. Res. 180

> is so unbounded and so open-ended * * * that it leaves to the legislatures, both state and federal, * * * the authority to define what it meant by "desecration." And that, of course, is a very broad and vague concept that would leave open * * * the possibility of punishing a wide range of conduct and speech with respect to the American flag. (Testimony of Michael Parrish, Aug. 14, 1989, at 71–72.)

Former Senator Mathias was troubled as well by the term "physical desecration," as he noted that "you could end up with a patchwork of State laws which as you cross State lines, you would have different criminal liabilities for particular acts with relation to the flag." (Mathias testimony, at 52.) Dean Griswold was troubled as well by the use of "physical desecration," as he testified that it "is not a word of everyday speech, not wholly clear in its meanings." (Griswold testimony, at 231.)

More specifically, Professor Dellinger commented that S.J. Res. 180.

> creates the possibility that there will be a wide array of different legislative interpretations of what constitutes "physical desecration," * * * Some States may assume that placing a flag on a pair of boots, similar to those the President gave to a leader of China, constitutes "physical desecration," of the flag. * * * Some may assume that an artist's rendering of "the flag" in green, white and orange constitutes "physical desecration;" others may conclude to the contrary. (Dellinger written statement, at 13.)

By using the term "physical desecration," S.J. Res. 180 will create more problems that it will solve. As summarized by Judge Pollak:

> The idea that freedom of speech would become not merely a modified commodity but so significantly variable

> a commodity strikes me as a very dismaying constitutional phenomenon. (Pollak testimony, at 31.)

3. S.J. Res. 180 would enable legislatures to rule far more widely in this area than previously thought possible.

As previously noted, Assistant Attorney General Barr testified that granting Congress and the States the power to prohibit "physical desecration" would simply restore the same power they had prior to the Court's decision in *Texas* v. *Johnson.* In his view, "the legislature would have the power under this amendment, which is the power they had prior to June 21st—so this is nothing new* * *" (Barr testimony, at 93.)

With the force of this particular proposed amendment behind them, however, many legislatures might in their enabling legislation proceed far beyond the boundaries that they previously understood to limit their authority. Prior to Texas v. Johnson, most legislatures, in Chairman Biden's words,

> understood full well that they were trespassing perilously close to impacting upon freedom of speech. And as a consequence, they in most cases were somewhat circumspect * * * in the way in which they attempted to "protect the flag." But with the passage of this amendment, it would seem * * * that any such inhibition on the part of state legislative bodies would be lifted. (Transcript of proceedings, Aug. 14, 1989, at 34.)

In response to questioning by Chairman Biden on this fundamental point, both Dean Griswold and Judge Pollak stated in clear and unequivocal terms that legislation enacted under the authority of S.J. Res. 180 might far exceed what has been enacted in the past. "It seems clear to me," said Dean Griswold, that S.J. Res. 180 "certainly does authorize the states to go beyond what most people contemplated or understood was the limit on their power in this area without a new amendment." (Griswold testimony, at 239.) And in Judge Pollak's view, S.J. Res. 180

> would not simply put us back to where we were prior to *Texas* v. *Johnson.* * * * This is an amendment which would do far more than simply generate the status quo ante and *would be an invitation to legislatures to rule far more widely than any of them had supposed they could.* Pollak testimony, at 34–35; emphasis added.)

* * * * * * *

For the reasons set forth above, the committee reported S.J. Res. 180 with an unfavorable recommendation.

IV. Vote of the Committee

On September 21, 1989, with a quorum present, by rollcall vote, the Committee on the Judiciary voted first on a motion to report S.J. Res. 180 with a favorable recommendation. The motion failed to carry by a vote of eight nays to six yeas, as follows:

YEAS (6)	NAYS (8)
DeConcini*	Biden
Heflin	Kennedy
Thurmond	Metzenbaum
Hatch	Leahy
Simpson	Simon
Grassley	Kohl*
	Specter*
	Humphrey

*By proxy.

The committee next considered a motion to report S.J. Res. 180 without recommendation. The motion failed to carry by a vote of eight nays to six yeas, as follows:

YEAS (6)	NAYS (8)
DeConcini*	Biden
Heflin	Kennedy
Thurmond	Metzenbaum
Hatch	Leahy
Simpson	Simon
Grassley	Kohl*
	Specter*
	Humphrey

*By proxy.

The committee next considered a motion to report S.J. Res. 180 with an unfavorable recommendation. The motion carried by a vote of eight yeas to six nays, as follows:

YEAS (8)	NAYS (6)
Biden	DeConcini*
Kennedy	Heflin
Metzenbaum	Thurmond
Leahy	Hatch
Simon	Simpson
Kohl*	Grassley
Specter*	
Humphrey	

*By proxy.

V. TEXT OF S.J. RES. 180

[101st Cong., 1st Sess.]

Proposing an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States

Whereas the Flag of the United States of America is a national symbol of such stature that it must be kept inviolate;

Whereas the physical desecration of the Flag should not be considered constitutionally protected speech; and

Whereas physical desecration may include, but is not limited to, such acts as burning, mutilating, defacing, defiling, or trampling on the Flag, or displaying the Flag in a contemptuous manner: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each

House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"Article —

"The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States.".

VI. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 26, 1989.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Sir: The Congressional Budget Office has reviewed S.J. Res. 180, a joint resolution proposing an amendment to the Constitutio of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States, as ordered reported by the Senate Committee on the Judiciary, September 21, 1989. CBO estimates that enactment of this legislation would result in no cost to the federal government and in no significant cost to state and local governments.

S.J. Res. 180 would propose an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States. The amendment would have to be ratified by three-fourths of the States within seven years of its submission for ratification.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 266–2860.

Sincerely,

Robert D. Reischauer, *Director.*

VII. ADDITIONAL VIEWS OF SENATORS EDWARD M. KENNEDY AND HOWARD M. METZENBAUM

We agree with the Committee's Report that we should amend the Constitution only where there is a clear and compelling need to do so. And we agree with its conclusion that the proposed contitutional amendment of flag desecration is poorly drafted, and so deeply flawed, that it would be irresponsible for Congress to send it to the States, even if one accepted the view that some response to the *Texas* v. *Johnson,* decision were necessary.

We write separately, however, because we believe that the existence of a facially neutral flag desecration statute has little bearing on the need to reject S.J. Res. 180. The Court's courageous and unpopular decision in the *Johnson* case vindicated the most important constitutional right symbolized by our flag: the right to differ. The Johnson majority reaffirmed the fundamental right of Americans to express themselves freely, no matter now outrageous or disagreeable their views may be. In our view, the most fitting way to honor both the Constitution and the flag is to do nothing in response to this decision—to reject both the proposed constitutional amendment and the proposed flag desecration statute.

The flag symbolizes all that is great and good about America. Flying high, it has spurred us to our loftiest national achievements; at half staff, it has comforted us in our deepest national sorrows. Anyone who burns the flag casts contempt on our country, our heritage and our history, and deserves the condemnation of every American.

But the question in *Texas* v. *Johnson* was not the flag, but the constitutional freedoms for which its stands. First among these is freedom of speech.

The concept of free and open debate at the heart of our democracy will be an empty promise if the Government can censor those who criticize it. The Founders understood that; and they adopted the Constitution and the Bill of Right to protect the freedoms of all Americans, including the fundamental freedom of citizens to criticize their government and the elected officials who represent them.

That constitutional freedom was the issue in the *Johnson* case. Geogory Lee Johnson committed a despicable act. He burned the flag to express his anger at the President. But Johnson was not prosecuted for starting a fire, or inciting a breach of the peace. He was prosecuted under a Texas law which made it a crime to mistreat the flag in a way that would seriously offend others. He was prosecuted because he used the flag to send a message with which the vast majority of Americans disagree.

The Supreme Court ruled that the Constitution prohibited the State of Texas from prosecuting Johnson for his offensive message. The Court's ruling reflects a deep understanding of the true mean-

ing of the Constitution. As Justice Brennan explained in his opinion for the Court:

> [The Court's] decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength.

That Johnson could have expressed his protest in a more palatable manner was of no moment. The Court recognized that the first amendment's protection of dissenting expression "is not dependent on the particular mode in which one chooses to express an idea." The Constitution forbids punishing both individuals who communicate protected speech, and individuals who communicate protected speech in an offensive—albeit non-obscene—manner.

Gregory Johnson's actions were deplorable, and the Court's decision that he must go free generated an initial firestorm of public outrage, which ignited an unwise effort to amend the Constitution to forbid flag desecration. But with the passage of time, millions of Americans have indicated that they are unwilling to tamper with the Constitution to silence dissent. It is wrong to desecrate the Constitution to prevent desecration of the flag. And it is wrong to try to show respect for the flag by diminishing the freedoms for which it stands.

The original Constitution and its 26 amendments are a monument to freedom and human dignity. Compared to the events that have shaped the Constitution, the burning of the flag in Texas by an obscure protestor was a tiny blip on the screen of history. But we will magnify it a thousandfold if it stampedes us into eroding the majesty of the Constitution. We must not turn this mindless, infantile act into an historic event.

The proposed constitutional amendment will do more violence to the Constitution than Gregory Lee Johnson could possibly have hoped to accomplish. For the first time in 200 years, an amendment would be enacted that creates an exception to the expansive freedom of speech protected by the Constitution.

In carving a loophole in the first amendment, the proposal will also undercut the remaining freedoms. The Constitution is the seamless fabric of our liberties. If we pull one thread, other freedoms will begin to unravel too.

Throughout our history, freedom of expression has rested on the notion that the Constitution, if it means anything, requires us to tolerate not just views that we approve, but views we detest as well. That fundamental principle is what gives America its true strength, and permits our flag to fly high.

Once we abandon the broad tolerance required by the Constitution, even for unpopular views, what will we say the next time we are offended by some other form of protest? Once we yield to the temptation to stifle dissent, there is no fair way to draw the line.

This is not an idle concern. The present debate surrounding S.J. Res. 180 illustrates the ease with which unpopular forms of protected expression can be swept away by a political whirlwind. If we succumb to an effort to erode the Bill of Rights during a time of relative tranquility, imagine how ill-suited we will be to prevent such efforts during times of crisis.

For these reasons, we regard the proposed amendment as a serious danger to the basic freedoms protected by the Constitution, and we urge our colleagues to reject it. After two centuries of unparalleled success for our free society, ours should not be the generation that begins to dismantle our constitutional freedoms.

The proposed statute is supported in good faith by many who see it as the only means of heading off a constitutional amendment. But if we really want to honor the constitutional values symbolized by the flag, we must oppose the statute as well.

Since the proposed legislation is not explicitly aimed at expression, it may be upheld by a majority of the Supreme Court against a constitutional challenge. But the outcome is in doubt, since the courts will obviously consider the degree to which enactment of the statute is motivated by the desire to stifle unpopular speech.

A number of outstanding scholars of the Constitution—with strikingly different points of view—testified before the committee that doing nothing is the best way to honor the flag and the constitutional values for which it stands. They include former Solicitors General Erwin Griswold and Charles Fried, Judge (and former Yale University Law School Dean) Louis Pollak, and former Senator Charles Mathias. The American Bar Association opposes both the constitutional amendment and the proposed legislation.

The Constitution has served America well for 2 hundred years. It has survived a Civil War and countless national debates over bitterly divisive issues. There is no need to adopt an amendment—or even pass a law—merely to express our anger at a single despicable act of flag burning. We respect the flag most when we take no action at all.

VIII. ADDITIONAL VIEWS OF SENATOR PATRICK J. LEAHY

The majority report argues forcefully in opposition to S.J. Res. 180. Amending the Constitution is, as the committee's votes indicate, a solemn act. I join in the report and write separately to emphasize my outrage at the prospect of amending the Constitution to address the issue of flag destruction.

All of us agree that the U.S. flag holds a unique place in the hearts of Americans. Destroying the flag is a despicable act—hostile to our shared values and sensibilities.

It should be outlawed and it will be outlawed. Both the Senate and the House of Representatives have voted overwhelmingly to prohibit physical destruction of the flag. When President Bush signs this legislation, burning the flag will violate the law of the land.

The Bill of Rights has not been amended once in our 200-year history

For two centuries the liberties embodied in the first 10 amendments to the Constitution have shielded individuals from the excesses of government. They are the foundation of our democracy.

While it is true that other generations have faced crises that precipitated cries for changes in the Bill of Rights, no generation in history has succumbed to the pressure. Reason prevailed and our basic charter of rights survived intact. Even in cases in which public outcry was fierce and opposition to an event or a decision of the Supreme Court was vociferous, the temptation to meddle with the rights we enjoy was resisted.

For example, in 1954, the U.S. Supreme Court held that the doctrine of "separate but equal" was unconstitutional as applied to public schools. School districts throughout the South ignored or tried to circumvent the Court's decision. One hundred and one Members of Congress signed a "Southern Manifesto" by which they pledged "to use all lawful means to bring about a reversal" of the decision.

President Eisenhower refused to endorse enthusiastically the Court's decision. Ultimately, however, Eisenhower stated, "The Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country." (Kluger, *Simple Justice: The History of Brown* v. *Board of Education and Black America's Struggle for Equality* 753 (1974).)

What if President Eisenhower had asked for a constitutional amendment to reserve *Brown* v. *Board of Education*? What if he had used the divisive issue of desegregation for own political advantage?

In retrospect, we are grateful that the President and the Senate upheld the Constitution. We enjoy the benefit of their sound judgment and political restraint. It is unfortunate that our President

has not displayed that same willingness to preserve the principles underlying the Constitution, notwithstanding his own personal disappointment in the Court's decision in *Texas* v. *Johnson.*

Instead, the administration calls on us to amend the Bill of Rights to prohibit physical destruction of the flag. The proposed constitutional amendment would essentially franchise out the first amendment, leaving States and localities to alter the product to suit local taste and passing sensibilities. It is unclear from the text of the amendment—perhaps intentionally so—what will pass muster and what will offend the Constitution, as the Court ultimately attempts to sort out desecration from mere disrespect, disrespect from mere negligence, and negligence from accident.

Amending the Constitution to ban flag desecration is a serious mistake, an unnecessary step, and an affront to the Constitution

The farmers anticipated that future generations would confront compelling reasons for tailoring the Constitution to their circumstances. The Constitution itself establishes the means by which it will be modified. This process is intentionally combersome. As James Madison said, "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions." (Rossiter, ed., The Federalist Papers, No. 49, at 314 (1961).)

Great and extraordinary occasions have demanded changes to the Constitution. It has grown as we have grown from a fledgling new democracy to the freest, most open society in the world. Along the way, we have modified the Constitution to guarantee the right of all Americans to enjoy equal treatment and protection under the law. Abolishing slavery and according to women, the right to vote are two examples of constitutional amendments that reflect the embody the principles of the document.

Amending the Constitution to prevent physical desecration of the flag is contrary to the spirit and intent of the very foundation of our democratic system. Moreover, this proposed constitutional amendment will tarnish and diminish the special meaning of the American flag as our unifying symbol. The proposed amendment purports to protect the physical integrity of the flag, but it misses the sense and substance of what it is that the flag protects: the integrity of a Constitution that has brought more people greater and deeper personal freedom for longer than any other document in history. The words of the proposed amendment rip at the fabric of the Constitution.

Our forefathers fashioned a unique charter—one deeply rooted in tradition and experience, yet dynamic, flexible, and capable of change. The framers were veterans of a bloody revolution, veterans who endured great hardship and sacrifice to preserve and ensure individual liberty and freedom. The Constitution was born of their struggle for independence—from Britain, from tyranny, and from government interference.

The Constitution is not a set of regulations. It is the wisdom of generations, gathered, tended, and set with care into a framework that guides and inspires. This unique charter, noble in its simplicity, will resemble the U.S. Tax Code if we rush to amend it time we

disagree with a decision of the Supreme Court. Dare we risk such a result?

The proposed constitutional amendment to ban flag burning is antithetical to constitutional principles, because rather then setting standards, it would pass on responsibility to Congress and the States without the mildest injunction to act in concert, to preserve the uniformity that has historically marked the Court's reading of the Bill of Rights as a national document.

As Duke University Law School Professor Walter Dellinger testified, amending the Constitution to override *Texas v. Johnson* will spawn a new jurisprudence of desecration. Moreover, it will be a jurisprudence resplendent in its variety. Until now the triumph of the first amendment has been its university. Free speech, which in Vermont has always been more of a part of life than a clause in a Constitution, will depend on where you are and how the state legislature or town board of selectmen define desecration.

Since the Senate passed overwhelmingly a bill to protect the flag as a unique symbol of nationhood, without threatening the Constitution, it behooves us to say that not only the current proposal to amend the Constitution, but *any* tampering with the first amendment—that true portal to the rest of the Constitution—is wrong and unacceptable.

As Prof. Dellinger told us, "Texas did not make it a crime to burn or destroy the American flag. Texas prohibited actions affecting the flag if and only if those actions expressed an idea offensive to others." (Statement of Walter Dellinger, at 4.) Either the Supreme Court will interpret this—or any other—amendment to the Constitution to be subordinate to the first amendment, and consequently insufficient to override the Court's decision in *Texas* v. *Johnson,* or the Court will read the amendment to sanction the kind of content-based statute it invalidated in *Texas* v. *Johnson*, with untold and unforeseeable consequences for the entire framework of constitutional protections.

If the Supreme Court were to construe the proposed amendment to apply to implementing enactments that are content-based, as Assistant Attorney General William P. Barr, who testified in favor of the amendment, and Prof. Dellinger both agree is most likely, then it is idle to believe that anyone can safely predict where the judicial excursion would end. The same is necessarily true of any amendment that would pass the test laid down by Robert H. Bork in testimony before this committee, to allow the prohibition of "offensive methods of making points that could be made in hundreds of other ways."

As the American Bar Association task force on the first amendment stated earlier this year:

> There are many components of the symbolism which causes the American flag to be so highly honored. Among these are national honor and integrity, a spirit of equality and democracy, freedom of religion, freedom from abuses by government or by a majority against a minority, but certainly in the forefront is freedom of speech. Just as the freedom of religion would not be furthered by a governmental effort to direct worship in channels favored by the

> majority, freedom of speech is not furthered by an effort to restrict speech or expressive conduct when it harms no one but is seriously offensive to many. These are very circumstances under which the true meaning of *freedom* of speech is tested and proved.

I oppose any amendment that in the end robs our flag of its unique symbolism. Moreover, this proposal reminds me of the "court-stripping" bills and proposed amendments that surfaced in the Senate in the early 1980's, proposals to end the debate on such divisive issues as school prayer and abortion by delegating to the States the obligation to speak decisively and finally, whether wisely or catastrophically.

We can protect and cherish the flag without invading the Constitution. The committee and both Houses of Congress have done so by passing content-neutral statues outlawing physical destruction of the flag.

Let us honor the Constitution and the flag by leaving the Bill of Rights intact. The Bill of Rights guarantees our diversity as a people. That diversity guarantees our democracy.

IX. SUPPLEMENTAL VIEWS OF SENATOR ARLEN SPECTER

I concur in the majority views expressed in this report, but wish to set forth my own thoughts on this important subject for the record.

I was dismayed by the Supreme Court's decision in *Texas* v. *Johnson,* 109 S. Ct. 2533 (1989), because I had never understood the first amendment to protect the despicable practice of burning the American flag. Over the years, the Court had carved out a number of commonsense exceptions to the literal words of the first amendment. For example, the Government may criminalize the distribution of obscenity, *Miller* v. *California,* 413 U.S. 15 (1973), and may constitutionally suppress "fighting words," *Chaplinksy* v. *New Hampshire,* 315 U.S. 568 (1942). Based upon these precedents, I had thought there was ample opportunity for the Court to uphold the Texas flag desecration statute at issue in *Johnson.*

A bare 5 to 4 majority of the Supreme Court, however, ruled that Gregory Johnson had engaged in "expressive conduct" when he burned the American flag and that therefore the Texas statute unconstitutionally punished protected speech. That decision called into question the validity of the Federal flag desecration statute, 18 U.S.C. 700, and led to calls for congressional action to protect the physical integrity of the flag. Proposals to accomplish this result have been the subject of exhaustive hearings before the Senate Judiciary Committee.

Some have argued forcefully that the Congres should not respond to the *Johnson* decision. This view was expressed most impressively at the August 1 hearing by Judge Louis Pollack, former dean of the Yale Law School. Judge Pollack and others argue that *Johnson* was correctly decided and we must simply tolerate the offensive conduct of those who maliciously destroy the American flag. I understand and respect this argument, but cannot accept it because I believe that *Johnson* was wrongly decided. I therefore believe it appropriate for Congress to take legislative action to protect the physical integrity of the flag within the new constitutional constraints articulated by the *Johnson* court.

Two options are presented. Some have urged enactment of a constitutional amendment authorizing the Congress and the states to prohibit flag desecration. Others urge that section 700 of the Federal Criminal Code be revised to address the constitutional concerns expressed in *Johnson.* On October 5, 1989, The Senate passed a bill embodying the statutory approach.

I have concluded that the statutory approach is preferable. As it decides between a statutory approach and a constitutional amendment, Congress should be guided by the same logic that leads the Supreme Court to decide a case on statutory grounds in reaching a constitutional issue is thereby avoided. The majority report aptly

quotes Justice Brandeis' famous concurring opinion in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (1936).

I am able to support the proposed statute because I believe it will pass constitutional muster. I do not read *Johnson* to render flag desecration statutes unconstitutional *per se.* The Texas statute was struck down because it, in common with the Federal statute, criminalizes the act of "casting contempt upon the flag." The proposed statute, in contrast, is content-neutral; it punishes the physical act of flag desecration instead of the intent to make a political statement about the flag.

Another argument in favor of the statutory approach is based upon a school of thought known as "legal realism." By enacting this revised statute, the Congress would present the Court with an opportunity to reconsider its decision in *Johnson.* History teaches us that the Court sometimes "follows the election returns," and is aware that national consensus has a subtle role to play in the complicated process of constitutional adjudication. For example, in the 1930's, a conservative majority of the Court struck down portions of President Roosevelt's New Deal legislation. After public opinion opposed the Court's actions and Roosevelt proposed his court-packing plan, Justice Roberts appears to have changed his vote. *Compare Morehead* v. *New York,* 298 U.S. 587 (1936), *with West Coast Hotel* v. *Parrish,* 300 U.S. 379 (1937). This has been referred to as the "switch in time that saved the nine." Gunther, Constitutional Law at 152.[1]

A second example comes from the late 1950's. After upholding several challenges to congressional investigations of Communist organizations, *see, e.g., Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957), the Court confronted a barrage of negative public opinion. The Court then moved away from this line of cases in *Barenblatt* v. *United States,* 360 U.S. 109 (1959), prompting scholars to claim that the Court had shifted its views in the face of public opinion. See, Gunther, *supra* at 1490.

By suggesting that the Court should reconsider its decision in *Johnson,* I do not mean to imply that the Court can or should be intimidated into changing its interpretation of the first amendment. Rather, this "legal realism" argument is merely an acknowledgement that the Court has, on occasion, changed its mind, and it is therefore prudent to give it the opportunity to do so in the context of an amended statute, one specifically designed to accommodate the constitutional concerns articulated by the Court.

One cannot, of course, predict with certainty the fate of the amended statute in the Supreme Court. That has led some to suggest that a constitutional amendment regarding flag desecration be proposed for consideration by the States. This would be a mistake. Amending the constitution is a grave undertaking; it is a process that should be invoked only as a last resort.

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[1] In fairness, it should be noted that not all scholars concur in this interpretation of Justice Roberts' motives. *See, Frankfurter, Mr. Justice Roberts,* 104 U. Pa. L. Rev. 311 (1955).

If the revised flag desecration statute is struck down by the Court, the Congress should give serious consideration to the promulgation of a 27th amendment. Until we have exhausted our statutory options, however, we should not tamper with the Bill of Rights.

X. MINORITY VIEWS OF SENATORS THURMOND, HATCH, SIMPSON AND GRASSLEY

WHY WE SHOULD PROTECT THE FLAG

Nothing else embodies the nationhood of the United States like our flag. It is the unique, unifying symbol of America. This venerated symbol is, however, at risk as a result of a recent 5–4 opinion of the Supreme Court. Because we believe that decision is profoundly wrong, and because we believe that an amendment to the Constitution is necessary to protect the flag, we file this statement of views on S.J. Res. 180.

THE *TEXAS* V. *JOHNSON* CASE

During the Republican Convention of 1984 in Dallas, Texas, Gregory Lee Johnson was an active participant in an anti-American demonstration through the streets of Dallas. As the demonstrators marched and chanted, they defaced buildings with spray paint, turned over potted plants, and ultimately gathered in front of Dallas City Hall.

At this time, Johnson was in possession of an American flag which had been stolen from a flag pole during their aggressive demonstration. As many citizens of Dallas watched in anger and disgust, Johnson doused the flag with kerosene and set it on fire. While he engaged in this offensive conduct, Johnson chanted, "America, the red, white, and blue, we spit on you."

Johnson was subsequently charged, tried, and convicted of violating a Texas statute prohibiting the desecration of a venerated object. [Similarly, the U.S. Congress and 47 other States have enacted statutes to prohibit the desecration of the American flag.] The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, 706 S.W.2d 120 (1986), but was later reversed by the Texas Court of Criminal Appeals, 755 S.W.2d 92 (1988), as inconsistent with the first amendment. United States Supreme Court granted certiorari and affirmed the appellate court decision. *Texas* v. *Johnson*, 109 S.Ct. 2533 (1989).

THE SENATE REACTION

Immediately after the Supreme Court ruling, the U.S. Senate expressed its resounding disapproval of the *Johnson* decision by a vote of 97–3. Additionally, both statutory language and proposed constitutional amendments were introduced to overturn the *Johnson* decision.

After consultation with both Republican and Democratic Senators, President Bush transmitted to Congress proposed language for a 27th amendment to the Constitution. The President's proposal states simply, "The Congress and the States shall have power to

prohibit the physical desecration of the Flag of the United States." This succinct language will overrule the *Johnson* decision without any adverse effect on our cherished first amendment freedom of speech.

Public officials and millions of American citizens continue to express their anger and dismay over the Supreme Court ruling. Letters, resolutions, and petitions from individuals, civic groups and organizations, city councils, and others have inundated the Congress with a plea for action to overturn the *Johnson* decision.

On July 14, the Senate entered into a unanimous consent agreement concerning legislative proposals addressing the *Johnson* decision. The agreement provided for at least four hearings on the flag issue. Also, the Senate Judiciary Committee would report the proposed constitutional amendment and the statutory approach to the Senate by September 22, 1989; the statutory approach to be the last item of business before the Senate prior to the October recess and the proposed constitutional amendment to be considered as the first item of business upon return and to remain the pending business until final disposition.

The Judiciary Committee held four hearings on the physical desecration of the American flag.

Over the course of the hearings, testimony was received from an impressive array of witnesses, including prominent constitutional scholars and historians, representatives of Veterans' organizations, the administration and Senators Dole, Dixon, and Thurmond.

The record of the hearings is replete with testimony and statements by members attesting to the respect and pride which an overwhelming number of Americans have for the flag. As the shining beacon of democracy for over 200 years, Old Glory has earned the admiration and respect of freedom loving people all over the world.

It was evident before the first hearing on this important issue that the primary interest is not *whether* we should provide protection for the flag, but *what* is the proper course to provide that protection. There was sharp disagreement among the witnesses as to whether a statute prohibiting flag desecration could survive constitutional scrutiny in light of the *Johnson* decision.

JUDICIARY COMMITTEE HEARINGS OFFER SUPPORT FOR THE AMENDMENT

As the first witness in the Senate to testify on legislation to reverse the *Johnson* decision, Senator Strom Thurmond (R–S.C) stated the responsibility before the Senate,

> [A]s a body, the United States Senate wants to see the opinion overturned. The question remaining is to determine the most desirable and effective approach to achieve our objective.

Testifying on behalf of the administration, Assistant Attorney General William P. Barr stated that

> the President and the Attorney General * * * are convinced that * * * the only way to ensure protection of the flag is through a Constitutional amendment.

The Assistant Attorney General further reasoned that a statute designed to protect the flag would be unconstitutional under *Johnson* and earlier Supreme Court decisions. In *Johnson,* the Court held that flag burning for expressive purposes is conduct protected by the first amendment. The Government's reason for affording protection to the flag as our national symbol is inherently and necessarily related to expression. In the *Johnson* decision, the Supreme Court clearly states that the Government's interest in protecting the flag as a symbol of nationhood and national unity does not overcome an individual's first amendment right to burn the flag for communicative purposes.

The Supreme Court's reasoning in the *Johnson* decision casts considerable doubt on the constitutionality of any Federal or State flag desecration statute. (See also the minority view of Senator Orrin G. Hatch and Senator Charles E. Grassley, report 101–152, accompanying S. 1338.)

A host of witnesses supported this view. Distinguished former jurist, Robert H. Bork, testified that "only a Constitutional amendment will be effective" in reversing the *Johnson* decision. Judge Bork reasoned that the Supreme Court would look to the legislative history of the statute to determine congressional intent. The legislative history of a proposed statute would clearly show congressional intent as an effort to reverse *Johnson* and prohibit people from physically desecrating the flag as a means of expressing contempt for American policy. Therefore, in Judge Bork's opinion, this alone is enough to guarantee that a flag statute will be struck down.

As Senator Dole testified:

> Isn't the purpose of the [Biden] statute to preserve our Flag as the symbol of national unity—to prevent any diminution in the symbolic power of the Flag through its mindless desecration—to overturn the *Texas* v. *Johnson* decision, in other words? * * * Without any reservations or hesitation whatsoever, I will state for the record that this *is* the very purpose of the constitutional amendment.

Additionally, Judge Bork stated that when conduct is "done for the purpose of expression," a statute forbidding that (conduct) will be upheld only if the Government can point to what the Court finds to be a "compelling governmental interest." What interest has the Government in preventing the burning of the flag? We believe that the only interest is in preventing its desecration. It is precisely this reason which the Court found insufficient in the *Johnson* case.

The Judiciary Committee received testimony advocating a content-neutral statute. Supporters argued that a prohibition of all physical destruction of the flag, regardless of communicative intent, would be constitutional.

But, Charles J. Cooper, former Assistant Attorney General for the Office of Legal Counsel during the Reagan administration, explained during his testimony that a content-neutral flag statute would simply not survive constitutional scrutiny. Nor would it be good public policy.

Mr. Cooper poignantly asked, "[D]oes anyone really want a neutral flag desecration statute?" The Senate is on record as overwhelmingly opposed to the *Johnson* decision which allows the *contemptuous* desecration of the American flag. The American public and responsible civic organizations have inundated congressional offices stating their anger and disgust with the *Johnson* decision.

Also, a "neutral statute" could make criminals out of patriotic citizens who burn or otherwise dispose of a flag which is worn beyond repair. Federal law already provides that "[t]he flag, when it is in such a condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning." 36 U.S.C. 176(k). A content-neutral flag desecration statute would necessarily jeopardize law-abiding citizens who dispose of a worn flag in a respectful, civil, and prescribed manner.

The Senate recently passed H.R. 2978 which prohibits the mutilation, defacing, physically defiling, burning, maintaining on the ground or floor, or trampling upon the flag in all cases except to allow disposal of old and worn flags. While we acknowledge that these exceptions are appropriate as a matter of sound public policy, it is our firm belief that they cannot be squared with the *Johnson* decision. The majority opinion clearly states that allowing some types of conduct with the flag while proscribing other conduct would not be constitutional. The majority opinion unambiguously states,

> If we were to hold that a state may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role * * * we would be saying that * * * the flag itself may be used as a symbol * * * only in one direction. We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol * * *

Therefore, there should be no mistake that either a truly "neutral" statute or one like H.R. 2978, would in all probability be ruled unconstitutional.

Amending the Constitution is a serious matter, one that is not entered into without deliberate and careful thought. But equally important, our Founding Fathers understood that the Constitution would, on occasion, need to be amended and included procedures in the Constitution for amending that great document under demanding circumstances. The record of our hearings, the outcry of the American public and elected officials, and the unique significance of our flag, attest that we face circumstances which demand an amendment to the Constitution.

In article V of the Constitution, two-thirds of both Houses of Congress can propose amendments or two-thirds of the State legislatures can call a constitutional convention for proposing amendments. These proposed amendments become a part of our Constitution when ratified by three-fourths of the State legislatures.

Since adoption of the Bill of Rights, one-fourth of the remaining amendments to the Constitution were proposed to overturn particular Supreme Court decisions. It is not a novel idea to amend the Constitution in response to actions taken by the Supreme Court.

Response to Questions Raised About S.J. Res. 180

We believe adoption of this amendment fulfills its intent to overturn the *Texas* v. *Johnson* decision and restore the power to Congress and the States to prohibit flag desecration which we believe they always had. In *Johnson,* the Court said it could not pick and choose which symbols were so unique as to warrant protection: "There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American Flag alone." This amendment establishes just such a category in the Constitution's text. Following in time, as it does, the 1st amendment, and the 14th amendment which has been held to incorporate the free speech guarantee against the States, there is simply no reason to think that S.J. Res. 180 will not do exactly what it says it will do—give Congress and the States power to prohibit physical desecration of the flag.

Indeed, the 16th amendment, worded in the same form as S.J. Res. 180, has certainly been effective. It reads:

> The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

This amendment did not say, "Notwithstanding Article I, Section 9, Clause 4," Congress shall have this power. Yet, the Federal income tax has been in place for the last 76 years.

What the amendment's critics are missing is this: S.J. Res. 180 neither replaces the language of the first amendment nor amends that amendment; it overturns a Supreme Court interpretation of that amendment.

S.J. Res. 180 Does Not Trump the Constitution

Moreover, some have argued that the amendment would "trump" various parts of the Constitution, such as the cruel and unusual punishment clause of the eight amendment, or other constitutional guarantees such as the ban against unreasonable searches and seizures in the fourth amendment.

There is no power in S.J. Res. 180 to trump anything; there is power to prohibit physical desecration of the flag, period. To the extent any provision of the Constitution has been construed by the Supreme Court as inconsistent with this power, this amendment prevails. But, nothing in the language of the amendment or in the intentions of its sponsors gives power to Congress or the States to override any other provision of the Constitution.

As mentioned earlier, the 16th amendment, which is phrased in the same style as S.J. Res. 180, has not wrought the consequences which the critics are now ascribing to the currently proposed constitutional amendment.

The power to tax incomes, of course, is a pervasive power. Yet, the 16th amendment has not trumped the eighth amendment. The right to a speedy trial under the sixth amendment is applicable to a tax prosecution. In short, the 16th amendment has not "trumped protections existing elsewhere in the Constitution.

We believe, in fact, it is likely that the overwhelming majority of States will leave their current laws in place if this amendment is enacted.

While these criticisms are interesting as an academic exercise, we do not believe they are of practical concern.

CONCLUSION

The authors of the majority report on S.J. Res. 180 acknowledge that the American flag is a national symbol worthy of respect, representing the values of our democracy. However, it is our view that a society which tolerates desecration of its most unique symbol risks the danger of losing those cherished values.

We share Chief Justice Rehnquist's conclusion that:

> Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Additionally, Chief Justice Rehnquist ably articulated the view of millions of Americans when he stated:

> The American flag * * * throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

Accordingly, we support the right of the American people, through the amendment process, to protect the flag of the United States of America from physical desecration.

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